UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 34

Docket No. CH-4324-08-0727-I-2

Debra Becwar,

Appellant,

v.

Department of Labor,

Agency.

March 4, 2011

Debra A. Becwar, Mauwatosa, Wisconsin, pro se.

Eileen R. Hurley, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review of an April 9, 2010 initial decision that denied her request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). For the following reasons, we GRANT the petition for review, VACATE the portion of the initial decision that imposes an additional burden on the appellant to prove her entitlement to the GS-12 Equal Opportunity Specialist position as a threshold issue in her USERRA discrimination appeal, and AFFIRM the initial decision as

modified, still FINDING that the appellant was not entitled to corrective action under USERRA.

BACKGROUND

¶2 The appellant was a GS-11 Equal Opportunity Specialist (EOS), who retired from employment in June 2009. *Becwar v. Department of Labor*, MSPB Docket No. CH-4324-08-0727-I-2 (Initial Appeal File 2 (IAF-2)), Tab 51 at 1. The appellant's retirement is not at issue in this appeal. *See* IAF-2, Tab 14 at 1. Her original appeal, *Becwar v. Department of Labor*, MSPB Docket No. CH-4324-08-0727-I-1 (Initial Appeal File (IAF)), was dismissed without prejudice, and this appeal was automatically re-filed. *See* IAF-2, Tabs 1-2. The appellant alleged below that the agency discriminated against her based on her obligation to perform military service, and she identified the following actions as being covered by her USERRA appeal:

> (1) denial of her career-ladder promotion to GS-12, which occurred on or about February 23, 2004 (and of which she received notice at end of September 2004);
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> (2) denial of her career-ladder promotion to GS-12 ongoing since February 23, 2004, up to the time of her retirement;
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> (3) issuance of a notice on February 6, 2004, that she would be put on a performance improvement plan (PIP), even though the threatened PIP was not imposed;
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> (4) performance evaluations of "meets expectations" at the end of her performance appraisal years in September/October of 2004, 2005, 2006, 2007, and 2008; and
>
> (5) placement on a PIP on September 29, 2006, which was rescinded one year and 3 months later in November 2007. She was on it for 6 months.

IAF-2, Tab 14 at 1-2. During a telephone conference, the administrative judge determined that agency actions #3 and #5 were moot because the former was never initiated and the latter was rescinded, and the agency did not take a

performance-based action against the appellant as a result of either PIP.[1] IAF-2, Tab 14 at 2.

¶3 The administrative judge decided to bifurcate the appellant's USERRA claim to initially adjudicate whether the agency's first decision to deny her promotion to GS-12 (during the time period of February 23, 2003, when she was promoted to GS-11, until September 30, 2004, the end of the performance appraisal period) constituted discrimination based on her obligation to perform military service, and he stated that he would hold in abeyance adjudication of the other, allegedly discriminatory actions covered by her USERRA claim.[2] IAF-2, Tab 14 at 3.

¶4 A hearing was held on January 14-15, 2010, and on February 5, 2010. Hearing Transcripts (HT) 1-3. The administrative judge issued an initial decision, concluding that the appellant was unable to explain how she demonstrated her ability to perform at the GS-12 level or that her performance deficiencies were caused by her absences for military duty, finding that her supervisors' testimony was credible and that the appellant's evidence was "outweighed" by the agency's "voluminous documentary record," which "showed the appellant demonstrated an inability to analyze data, accurately identify indicators of discrimination, and synthesize disparate data into relevant findings

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[1] On review, the appellant challenges the administrative judge's decision to dismiss these claims. *See* Petition for Review (PFR) File, Tab 1 at 18-19. There was no indication that the appellant objected to this decision in the September 4, 2009 Order Summarizing Telephonic Conference. *See* IAF-2, Tab 14. In fact, the Order explained that, if the summary was inaccurate, the parties must notify the administrative judge within five days of receipt of the order, *see id.* at 4, and the appellant did not do so. Thus, we need not consider this issue on review.

[2] The administrative judge noted that neither party "voiced a strong objection" to his bifurcation proposal. *See id.* at 3. On review, the appellant acknowledges that she agreed to such bifurcation. *See* PFR File, Tab 1 at 21.

of fact," and concluding that the appellant was not entitled to corrective action.[3] IAF-2, Tab 51 at 17-20. The appellant filed a petition for review and the agency filed a response. PFR File, Tabs 1, 3.

ANALYSIS

¶5 A USERRA "discrimination" case involves an allegation in which the appellant claims that an agency has taken an action prohibited by 38 U.S.C. § 4311(a). *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 5 (2005). An employer is considered to have engaged in action prohibited by 38 U.S.C. § 4311(a) if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. 38 U.S.C. § 4311(c)(1). Thus, in a USERRA action, there must be an initial showing by the employee, by preponderant evidence, that the employee's military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, also by preponderant evidence, that the action would have been taken for a valid reason despite the protected status. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

¶6 The appellant's first claim of error on review is that the administrative judge improperly increased her burden of proof, in the initial decision, by

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[3] With respect to the appellant's remaining USERRA discrimination claims, regarding the other personnel actions, the administrative judge dismissed those claims without prejudice, pending the finality of the initial decision or the finality of any decision that is issued based on an appeal from the initial decision. IAF-2, Tab 51 at 20-21. On review, the appellant complains that the administrative judge's dismissal of those claims "would require [her] to undergo significant time and expense refiling those claims." PFR File, Tab 1 at 21. We do not find this argument persuasive, since the appellant's submission would only need to indicate which claims she seeks to re-file, and any evidence already in the record regarding these claims would not need to be re-submitted.

requiring her to prove her entitlement to the GS-12 EOS position. PFR File, Tab 1 at 7-8. In the September 4, 2009 Order Summarizing Telephonic Conferences, the administrative judge properly apprised the parties of their respective burdens of proof. *See* IAF-2, Tab 14 at 2-3. However, for the first time in the initial decision, the administrative judge appears to have imposed an additional burden on the appellant:

> In the instant petition for remedial action, the appellant has the burden of proving that the agency's denial of her career-ladder promotion to GS-12 in 2004 was motivated by the agency's discontent with her absences from work for military duty. *But before directly addressing the USERRA discrimination issue, the appellant must first prove that she was entitled to be promoted from GS-11 to GS-12. If she fails to prove that she was entitled to the promotion, her claim that the denial was based on her obligation to perform military service fails.*

IAF-2, Tab 51 at 6 (emphasis supplied). The administrative judge then discussed the qualifications for promotion to the GS-12 position, the appellant's performance during the relevant time period, as well as the agency's evidence of her performance. He found that the appellant failed to show by a preponderance of the evidence that she was entitled to a promotion to GS-12 in 2004, and he concluded that her claim of military status discrimination must fail. *Id.* at 6-20.

¶7 We agree with the appellant's argument in this regard. In the initial decision, the administrative judge improperly placed the burden on *the appellant* to prove *her entitlement* to a GS-12 position as a threshold issue in her USERRA appeal. In a traditional USERRA nonselection appeal, the Board does not consider whether the applicant was "entitled to" or "qualified for" the position. Rather, consistent with *Sheehan*, once jurisdiction is established, the Board analyzes whether the appellant has shown that her military service was a motivating or substantial factor in the agency's action and whether the agency has shown that it would have taken the same action despite the appellant's protected status. *See, e.g., Fedder v. Department of the Interior*, 103 M.S.P.R. 221, ¶ 8

(2006) (the Board's role in a USERRA appeal is not to determine whether the appellant *should have been* selected for the position, but to determine whether the agency's decision was based on discrimination because of the appellant's military service); *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, ¶ 15 (2001) ("[T]he Board has held, and we reaffirm today, that its authority with regard to USERRA complaints or appeals does not extend beyond the complained-of discrimination because of military status, does not allow for a decision on the merits of the underlying matter except to the extent necessary to address the appellant's military status discrimination claims. . . ."). We therefore vacate the administrative judge's analysis of the appellant's USERRA claim to that extent. We need not remand the appeal, however, because the parties were given proper notice of their respective burdens prior to the hearing and the record is fully developed on the issue of the appellant's non-promotion during the 2003-2004 time frame. *See Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 18 (2010). Moreover, as discussed below, the evidence improperly considered by the administrative judge as a threshold issue is entirely relevant to our analysis of the appellant's USERRA appeal, regardless of how one frames the issue.

¶8 To adjudicate this appeal, we must first consider whether the appellant has proven, by preponderant evidence, that her military status was a motivating or substantial factor in the non-promotion. The appellant presented testimonial evidence that some agency officials may have viewed her use of military leave in a negative way. For instance, Linda Bartucca, who had been employed as a program analyst at the agency, and then, later, worked with some of the relevant management officials as a Labor and Employee Relations Specialist at the Office of the Assistant Secretary for Administration and Management (OASAM) Regional Office, testified that Shirley Thomas, the Deputy Regional Director of the Midwest Region, and the appellant's third-line supervisor, disliked the appellant's use of military leave and discriminated against her (the appellant) based on her military service because she (Ms. Thomas) wanted the appellant to

rescind her military leave and put the mission of the agency first.[4] HT-3 (Bartucca) at 5-14. Ms. Bartucca also testified that Ms. Thomas told her that she was going to take actions to prevent the appellant's military leave:

> She was directing [Margaret Kraak, District Director and the appellant's second-line supervisor] to kind of, for lack of a better term, dump on you and just give you more cases to work in a very short window, a very short time frame, a tight deadline, prior to your going on military leave that would require you to close-out those cases prior to leaving. And if you did not, then there would be consequences for failing to perform your assignments. So, they could take performance action[sic] against you or disciplinary action again you.

Id. at 11. Ms. Bartucca also testified that she advised Ms. Kraak that Ms. Thomas's plan could get them "in some very serious trouble [for violating USERRA]." *Id.* at 13.

¶9 Mr. Stahlheber, the appellant's first-line supervisor from April 2003 until April 2004, testified that he was directed by Ms. Kraak to monitor the appellant's military leave. HT-1 (Stahlheber) at 209. Mr. Stahlheber also testified that, at one point, Ms. Kraak said to him that if the appellant "had spent as much time planning [her] work as [she] planned [her] military leave, then [she] would not be in this situation." *Id.* at 202. In the initial decision, the administrative judge credited Mr. Stahlheber's testimony that the management in the Chicago Regional Office "is very arrogant, incompetent, and has engaged in immoral, illegal, discriminatory acts against its employees" and that "senior level management in the Regional Office are only interested in looking for ways to get rid of employees and has initiated illegal actions to accomplish that end." IAF-2, Tab 51 at 14.

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[4] The appellant alleges on review that the administrative judge failed to secure a transcript of Ms. Bartucca's testimony before he issued the initial decision and to give greater weight to her testimony. PFR File, Tab 1 at 8-9. The administrative judge is not required to obtain a transcript of Ms. Bartucca's testimony, particularly when he observed her live testimony. Therefore, this argument is without merit.

¶10 Ms. Thomas denied discriminating against the appellant because of her request for, or use of, military leave; in fact, she stated that she had nothing to do with the district office's approval of leave. *See* HT-2 (Thomas) at 310. Ms. Thomas also denied directing Mr. Stahlheber to take any personnel actions against the appellant and she denied talking to Ms. Bartucca about her.[5] *See id.* at 314-16. Ms. Kraak testified that the appellant's military leave did not have any impact on the assignment of cases, the deadlines associated with those cases or her evaluation of the appellant's work on those cases, and she outright denied that she discriminated against the appellant based on her military leave or that such leave was the basis for the agency's decision not to promote her. *See, e.g.*, HT-2 (Kraak) at 160, 166, 184, 190-91. We note, too, that the parties stipulated that none of the appellant's requests for military leave was ever denied. HT-3 at 71-72.

¶11 Even if we credit Ms. Bartucca's and Mr. Stahlheber's testimony in this regard, we cannot conclude that such allegations demonstrate that the appellant's military service was *a motivating* or *substantial* factor in the agency's decision not to promote her to the GS-12 EOS position during, or as a result of, the 2003-2004 appraisal period. Notably, as the administrative judge stated in the initial decision, there is no evidence that the appellant's use of military leave impacted any deadline or assignment that would have affected her ability to be promoted during the 2003-2004 appraisal period:

> Although the appellant asserted that District Director Kraak intentionally gave her assignments with deadlines that would be impossible to meet because of her absences for military duty, the appellant was unable to identify – under lengthy cross examination –

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[5] As the appellant notes on review, the administrative judge did not include a discussion of Ms. Thomas' testimony in the initial decision and she speculates that the administrative judge failed to consider this testimony because it was not credible. PFR File, Tab 1 at 9-10. In light of our consideration of Ms. Thomas's testimony herein and our disposition, we need not address this issue on review.

> any instance where her ability to meet a deadline was impacted by an absence for military duty. In fact, the appellant was not even required to complete the one assignment about which she most vigorously argued Ms. Kraak scheduled a deadline to conflict with military leave. More specifically, the appellant asserted that prior to four days of military leave scheduled to begin on Monday August 18, 2003, Ms. Kraak told the appellant to complete a pre-determination notice (PDN) in the Fleetguard case by Monday August 25, 2003, which would be the appellant's second day back in the office after her military leave. But the record shows – and the appellant admitted during her testimony – that on Friday August 15 Ms. Kraak agreed to prepare the PDN herself and, in fact, did complete the PDN for the appellant. . . . Thus, the agency demonstrably accommodated the appellant's obligation to perform military duty. Nevertheless, the appellant further complained that the Regional Office rejected the PDN Ms. Kraak prepared and continued to cite the PDN as an example of *the appellant's* poor performance. This assertion is not persuasive. Ms. Kraak prepared the PDN based on information the appellant gathered from the contractor; and the record shows that before submitting the PDN to the Regional Office, Ms. Kraak referred the PDN to the appellant for her review and appropriate feedback. . . .

IAF-2, Tab 51 at 18 (emphasis in original).

¶12 Even if we were to conclude from this limited evidence that the appellant proved by preponderant evidence that her military service was a motivating factor in the agency's decision not to promote her to the GS-12 position, the agency's evidence regarding her performance during the relevant time period was critically important to the agency's burden of proof, i.e., whether it would have decided *not* to promote her, absent her military status. Having reviewed the testimonial and documentary record, we find that the agency has met its burden to show, by preponderant evidence, that it would not have promoted the appellant to the GS-12 EOS position, absent her military service, and, thus, the appellant is not entitled to corrective action under USERRA.

¶13 As discussed in the initial decision, there were three requirements for promotion to the GS-12 position: 1) one-year in grade at the GS-11 level; 2) an acceptable performance rating; and 3) an ability to perform at the next higher

grade level.[6] IAF-2, Tab 51 at 6-7. The record reflects that, in February 2004, she had served one year in grade at the GS-11 level, she was rated "effective" for the performance appraisal periods ending on September 30, 2003, and September 30, 2004, and she was informed that she would not be promoted to the GS-12 position on September 20, 2004. *See, e.g.*, IAF, Tab 17, Exhibits I1-I6, J12; IAF-2, Tab 31, Subtab III, Exhibit H.

¶14 There was, however, ample testimonial and documentary evidence to show that the appellant, from February 23, 2003, until September 30, 2004, was not able to perform at the GS-12 level.[7] The initial decision thoroughly describes

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[6] On review, the appellant contends that the administrative judge erred by finding that there was this third criteria for promotion, and by relying, in part, on her representative's statement in the arbitration hearing to support that conclusion. PFR File, Tab 1 at 14-17. Although the appellant originally argued, below, that only the first two elements were required for promotion, she later conceded that she was aware that she would need to demonstrate that ability to perform at the GS-12 level before she was eligible for a promotion. *See* HT-2 (appellant) at 23. In addition to her concession, she submitted into the record the agency's post-hearing brief and her representative's closing statement in the arbitration matter, as well as the arbitrator's decision denying the appellant's grievance. *See* IAF-2, Tab 31, Subtab II, Exhibits E (agency's post-hearing brief), F (the appellant's closing statement, which acknowledges that the employee has to demonstrate that he can work at the next grade level to be eligible for promotion), G (arbitrator's decision). Thus, we discern no error with the administrative judge's decision to consider her representative's statements during that arbitration or his conclusion that these three elements were required for promotion.

[7] The appellant argues on review that the relevant time frame for consideration of this non-promotion action is limited from February 23, 2003, until February 23, 2004. *See* PFR File, Tab 1 at 17. However, her petition for review does not contain any citations to relevant Board or Federal Circuit authority or any agency policy or collective bargaining agreement in effect at the time to support her contention that her eligibility date should be the ending date for our consideration. From our review of the record, it appears that, in February 2004, the agency was under no obligation to discuss with the appellant the reasons for a decision not to promote her once she became eligible for the promotion. Rather, the record reveals that the agency did not have such an obligation until Article 20 of the National Agreement was revised on September 2, 2004. *Compare* IAF, Tab 17, Exhibits B2-B8 (July 1, 2002 National Agreement), D (Departmental Personnel Regulations, Chapter 335), *with id.*, Exhibits B9-B16 (revised Article 20). Indeed, we find no evidence that any management official actually made and communicated a decision not to promote the appellant until September 2004. In the

this evidence and supports the administrative judge's well-reasoned conclusions in this regard. *See, e.g.*, IAF-2, Tab 51 at 10-17. Notably, the administrative judge credited the testimony of Ms. Kraak, Mr. Stahlheber and Mr. Hawkins. *See id.* at 19 (citing *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-60 (1987)). The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The appellant has not identified such reasons.[8]

¶15 Based on our review of the entire record, we agree with the administrative judge's ultimate conclusion that the agency demonstrated that it would not have promoted her absent her military status, based on her performance during the

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absence of evidence that the agency was required to make a decision at the one-year eligibility mark, or that the agency made such a decision at that time, plus the fact that the end of the performance appraisal period coincided with the agency informing the appellant, in writing, that she would not receive the GS-12 promotion, we believe it is appropriate to consider her performance from February 23, 2003, through September 30, 2004. We also conclude that it is appropriate to consider the testimony of Rodney Hawkins, her first-line supervisor, who began supervising her in May 2004 and who informed her that she was not receiving the GS-12 promotion. We therefore find that her arguments regarding the administrative judge's allegedly improper consideration of his testimony unpersuasive. *See* PFR File, Tab 1 at 11.

[8] On review, the appellant contends that the administrative judge completely misconstrued Mr. Stahlheber's testimony and she includes his May 12, 2010 declaration, made under penalty of perjury, stating, among other things, that he believes that the appellant was working at the GS-12 level and his opinion that the agency discriminated against the appellant based on her military leave. PFR File, Tab 1 at 11-14; *see id.* at 39 (declaration). Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). We note that Mr. Stahlheber testified on the appellant's behalf; thus, his testimony in this regard was available to the appellant but she did not elicit such testimony from him. Therefore, we do not consider this argument – or his declaration – as new evidence on review.

2003-04 performance appraisal period. Thus, she was not entitled to corrective action under USERRA based on this claim.

¶16 We have also considered the appellant's remaining arguments on review, including her contentions regarding the administrative judge's decision to deny her request for certain witnesses, and we find that they are without merit.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.